Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

CHESLEY T. MEARS, ELIZABETH A. THOMPSON, DORIS B. McADAMS, JOHN L. McADAMS and CAROL M. VAN BRUNDT,

Petitioners,

versus

FEDERAL DEPOSIT INSURANCE CORP., AS LIQUIDATING AGENT/RECEIVER OF OLYMPIC INTERNATIONAL BANK AND TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a sale of real property for non-payment of taxes under Massachusetts General Laws c. 60, §79 unconstitutionally deprives interested parties of due process of law, to the extent that the sale goes forward in the absence of actual notice of the proceedings directed to the record owners by devise of the property?

2. Whether a due process violation occurring in the taking and sale of real property for non-payment of taxes may be cured by retrospective legislation?

3. Whether the 1986 enactment of Massachusetts General Laws, c. 60, §80C unconstitutionally extinguished existing rights of action by failing to provide for any time within which to assert such claims?

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No.

IN THE
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OF THE
UNITED STATES

OCTOBER TERM, 1994

CHESLEY T. MEARS, ELIZABETH A. THOMPSON, DORIS B. McADAMS, JOHN L. McADAMS and CAROL M. VAN BRUNDT,

Petitioners,

versus

FEDERAL DEPOSIT INSURANCE CORP., AS LIQUIDATING AGENT/RECEIVER OF OLYMPIC INTERNATIONAL BANK AND TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

GROUNDS FOR JURISDICTION

The Petitioners seek review of the April 21, 1995 denial by the Supreme Judicial Court of Massachusetts of their Application for Further Appellate Review of

the March 3, 1995 decision of the Appeals Court of Massachusetts, affirming a March 23, 1994 judgment of the Land Court of Massachusetts. A-1. In the trial court action, the Petitioners had challenged the constitutional adequacy of the constructive notice given by the Town of Hamilton, Massachusetts of a 1936 taking of real property for nonpayment of taxes, and of a 1941 public sale of the property following an ex parte administrative foreclosure of all redemption rights. Jurisdiction over the matters set forth in this petition lies with the Supreme Court pursuant to 28 U.S.C. §1257.

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, §1

"No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law..."

Massachusetts General Laws c. 60 §16

[reproduced in appendix]

Massachusetts General Laws c. 60 §53

[reproduced in appendix]

Massachusetts General Laws c. 60 §62

[reproduced in appendix]

Massachusetts General Laws c. 60 §65

[reproduced in appendix]

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[reproduced in appendix]

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[reproduced in appendix]

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[reproduced in appendix]

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[reproduced in appendix]

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[reproduced in appendix]

Massachusetts General Laws c. 60 §80C

[reproduced in appendix]

STATEMENT OF THE CASE

The Petitioners, Chesley T. Mears, et als. (hereinafter, the "Mears Heirs") brought an action in the Massachusetts Land

Court challenging the validity of the Respondent's claim of title to a certain parcel of land located in Hamilton, Massachusetts (the "Property"), as described in a deed dated June 22, 1921, from Bertram W. Mears to Charles W. Mears. A-2. The Respondent is the Federal Deposit Insurance Corporation ("FDIC"), as Liquidating Agent/Receiver of Olympic International Bank and Trust Company. The Mears Heirs are the heirs at law of Nellie M. Mears, Delmer Mears, and Ada McAdams (hereinafter, "the Devisees"), to whom Charles W. Mears devised the Property under the residuary clause of his will. A-2-3.

Shortly after Charles Mears died on August 19, 1933, his son and co-executor of his will, Delmer Mears, offered the will for probate in the Essex County, Massachusetts Probate Court. A-3.. The will was allowed on October 13, 1933. A-3.

In 1936, the Town of Hamilton, Massachusetts (hereinafter sometimes referred to as "the Town"), initiated proceedings to take the Property for non-payment of taxes allegedly owing for fiscal year 1935. A-15. On April 10, 1936, the Town directed a statutory demand for payment of the outstanding taxes to a party or parties identified only as "Charles W. Mears (heirs)". A-15..; *see* M.G.L. c. 60, §16, A-26.[1] The courts below did not find, nor did the FDIC ever contend, that the Town actually served one or more of the Devisees with a demand for payment. A-9-10. No less than fourteen days after making its demand, the Town published and posted statutory notice of its intention to take title to the Property. A-15.; *see* M.G.L. c. 60, §53, A-27. On July 30, 1936,

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[1]The Appendix contains versions of the pertinent statutes in effect at the times of the taking and sale. In terms of procedural requirements, the current statutes are not significantly different from the earlier versions.

the Town took title to the Property by an Instrument of Taking, subject to statutory rights of redemption. A-15.; *see* M.G.L. c. 60, §62, A-28-29.

On October 7, 1941, following ex parte administrative proceedings, the Massachusetts Commissioner of Corporations and Taxation, pursuant to M.G.L. c. 60, §79, executed an Affidavit to Foreclose Tax Title on Land of Low Value, declaring the Property to be of insufficient value to meet the taxes, interest and charges due. A-16. Following a public sale conducted according to M.G.L. c. 60, §§79 & 80, the Town conveyed the Property to itself by a Treasurer's Deed dated November 29, 1941. A-16. There is no record as to how or to whom the Town gave notice of the 1941 tax sale.[2] The FDIC derives its title from the

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[2]The 1941 version of Section 79 required only that notice of the sale be posted in a public place. A-35.

1941 Treasurer's Deed and the subsequent chain of conveyances.

The Proceedings Below

On June 18, 1993, the Mears Heirs raised the federal questions herein presented by moving for partial summary judgment,[3] on the grounds that, under *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the taking and sale of the Property by the Town of Hamilton did not meet minimum constitutional standards, due to the Town's failure to give notice to the Devisees of the 1936 taking and of the 1941 sale by mail or by other means as certain to ensure actual notice, and that such a fundamental jurisdictional defect in a tax title is not remediable by curative

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[3]The Mears Heirs had concomitantly sought to establish a way of necessity through an abutting parcel with road frontage, from which the Property had been severed in 1884.

legislation or laches.[4] The FDIC filed a cross-motion for summary judgment, urging the court to infer from the record that the Devisees must have known that the Property was subject to an outstanding tax liability, and arguing that there was no need, therefore, for the Town to give anything other than constructive notice of the taking and sale. The FDIC further contended that M.G.L. c. 60, §80C, a curative statute enacted in 1986, barred the Mears Heirs from pursuing their claim.

On March 23, 1994, the trial judge issued an order granting the FDIC's cross-motion, ruling that the 1936 taking was valid and not subject to challenge because: (1) the direction of the demand for

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[4]Portions of the supporting memorandum filed by the Mears Heirs with their partial summary judgment motion are reproduced in the Appendix to indicate the manner in which the federal questions presented in this petition were raised below. A-19-23. The Fort Hill Corporation, identified in the caption as the defendant in the trial court action, was succeeded by the FDIC during the pendency of the motion. A-13-14.

payment, and of the published and posted notice of the 1936 taking, to a party or parties identified only as "Charles Mears (heirs)", was sufficient to apprise the Devisees that a tax was being assessed to them; and (2) the Town complied with the 1936 procedural requirements of M.G.L. c. 60, §§79 & 80.[5] A-16-17. The trial judge further ruled that M.G.L. c. 60, §80C barred the Mears Heirs from challenging the 1936 taking due to the passage of more than twenty years since the taking occurred. A-17-18. The trial judge made no findings or rulings with respect to the 1941 sale, and did not address the constitutional issues duly raised by the Mears Heirs.

By unpublished rescript opinion issued on March 3, 1995, the Massachusetts Appeals Court affirmed the trial court judgment,

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[5]A curious finding, since the low value foreclosure and sale conducted under these statutes did not occur until 1941. A.. The 1936 taking was authorized under M.G.L. c. 60, §53. A..

again without express reference to the constitutional questions presented by the Mears Heirs. A-2-12. On April 24, 1995, the Supreme Judicial Court of Massachusetts declined, without comment, to grant further appellate review of the decision of the Appeals Court. A-1.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a direct conflict between federal and state jurisprudence concerning the constitutionality of the statutory notice provisions pertaining to tax sales conducted under Massachusetts General Laws c. 60, §79. In 1982, the Supreme Judicial Court of Massachusetts held that published notice of a Section 79 tax sale by itself afforded due process of law to interested parties. *Guaranty Mortgage Corp. v. Town of Burlington*, 385 Mass. 411, 419 (1982). The following year, the United States Supreme Court issued its opinion in

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). In 1989, the United States District Court for the District of Massachusetts applied *Mennonite* in invalidating a 1929 taking and a 1931 tax sale under Section 79 for want of due process in the form of actual notice to the record owners. *In Re Stacy*, 99 B.R. 142, 148-151 (D. Mass. 1989). Despite the prevailing disharmony between federal and state case law on this issue, the Massachusetts Supreme Judicial Court failed to take advantage of the opportunity presented by this case to achieve a much-needed resolution, letting stand the lower courts' erroneous reliance on the dubious presumption that the Devisees were aware of the delinquency, which in any event is not tantamount to knowledge of a scheduled tax taking or sale, and on an ineffective and unconstitutional curative statute. For these reasons, and in view of the

underlying merits of the Petitioners' claim, a grant of certiorari is in order.

A. The failure of the Town of Hamilton, Massachusetts to provide notice of the 1941 tax sale to all readily ascertainable interested parties by mail or by other means as certain to result in actual notice violated the constitutionally guaranteed right of such interested parties to due process of law.

In 1983, the United States Supreme Court held that a municipality is constitutionally required to provide all interested parties, including mortgagees of record, with actual notice of a scheduled tax sale, given by mail or by personal service. *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). In the opinion of the *Mennonite* court:

> "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of **any** party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."

462 U.S. at 800 (emphasis included in original text).

Record owners by devise of tax-delinquent real property, whose names and addresses are readily ascertainable from local probate records[6], are at least as entitled to actual notice of a scheduled tax sale as was the mortgagee in *Mennonite*. The record below reveals no attempt whatsoever by the Town to provide the Devisees with actual notice of either the 1936 taking or of the 1941 sale. Both the trial court and the Appeals Court focused exclusively on the initial statutory demand for payment, concluding that the demand alone was sufficient to validate all of the subsequent proceedings. A-8-10, 16-17. Assuming, for the sake of argument, that the demand had reached the Devisees,

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[6]Delmer Mears's petition for probate of his father's will, which was part of the trial court record, shows that Devisees Nellie M. Mears and Delmer Mears resided in Essex, Massachusetts, and that the third Devisee, Ada McAdams, resided in Chelsea, Massachusetts. A-24-25.

however, the *Mennonite* standard would not have been satisfied, since "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983).[7]

The constitutional requirement of actual notice cannot be evaded through the ex parte administrative procedure established under Massachusetts General Laws c. 60, §79, pursuant to which all rights of redemption are extinguished upon a determination that the property in question is of "low value" within the statutory definition. The protections afforded by *Mennonite* are not restricted to property interests to which a certain minimum value can be assigned. Furthermore, the extent of available

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[7]The statutory demand for payment is required to be mailed to the assessee's last and usual address, and consists merely of a statement of the amount of the tax due along with a demand for its payment. M.G.L. c. 60, §16, A-26.

procedural rights cannot be conclusively determined by a process which takes place in the absence of any notice or opportunity for interested parties to be heard. *Cf. Hagar v. Reclamation District No. 108*, 111 U.S. 701, 710 (1884)(procedure for valuation of real property for tax purposes is judicial in nature and, accordingly, due process requires notice and an opportunity to be heard before the tax is conclusively fixed).

While an ordinary tax sale under Massachusetts law is conducted upon published and posted notice alone, the question of the constitutionality of such notice appears not to have arisen, since such a sale must be preceded by a judicial foreclosure of redemption rights, with its attendant procedural safeguards. *See* M.G.L. c. 60, §§65-69, A-30-33. A low value sale conducted under M.G.L. c. 60, §79, by contrast, follows an ex parte

foreclosure procedure in which the right of redemption, a valuable property right in itself, is summarily obliterated in the absence of any form of notice, actual or constructive. As long ago as 1976, the Massachusetts Supreme Judicial Court acknowledged the potential adverse consequences of a faulty low value determination under Section 79 and, accordingly, held that a landowner is entitled to challenge a low value certification, which prior to *Bigham* would have been unassailable, by filing a suit in equity to enjoin the sale of the land. *Bigham v. Commissioner of Corporations and Taxation*, 371 Mass. 270, 271-272 (1976). The *Bigham* court failed, however, to take the next logical step, necessary to give practical effect to its holding, by requiring actual notice of the tax sale following the foreclosure. Under M.G.L. c. 60, §79, as it was in effect in 1941 and

remains in effect today, valuable property rights have been, and will continue to be wiped out in arbitrary fashion, without meaningful notice to interested parties[8], and without accountability for error.[9]

B. A failure to observe constitutional notice requirements in the taking and sale of tax delinquent property is not subject to curative legislation.

Both the trial court and the Massachusetts Appeals Court cite Massachusetts General Laws c. 60, §80C as a

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[8]As the *Mennonite* court observed, notice by publication and posting is not designed to reach interested parties, and is not likely to do so; it is primarily intended to draw prospective purchasers to the tax sale. 462 U.S. at 769.

[9]The foregoing discussion of the low value foreclosure procedure may be academic since, under a careful reading of *Mennonite*, the Town's 1936 taking, which preceded the low value certification by five years, was itself incurably void for want of notice. The Indiana statute invalidated in *Mennonite* provided for the sale of the delinquent property to a third party subject to a two year redemption period. 462 U.S. at 791. Under the Massachusetts procedure followed in this case, the municipality retained title during the redemption period. M.G.L. c. 60, §53. A-27. Either way, a taking or third party tax sale conducted without actual notice is void under *Mennonite*, even where the rights of interested parties are not irrevocably extinguished in the process.

bar to the Mears Heirs' challenge to the 1941 tax deed, A-11-12, 17-18, disregarding the well-settled principle that jurisdictional defects in procedures affecting liberty or property interests, including defects based on want of legally mandated notice, cannot be rectified by retrospective legislative fiat. *See, Marx v. Hanthorne*, 148 U.S. 173, 182-184 (1893); *Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318, 329-330 (1900). Section 80C, enacted in 1986, purports to cure all defective tax deeds which have stood unchallenged for twenty years after the date of recording. Section 80C is not a statute of limitations, since the passage of the prescribed time period destroys the underlying substantive claim as opposed to merely cutting off the procedural remedy. The Massachusetts Supreme Judicial Court has implied that it considers Section 80C to be a curative statute as opposed to a

statute of limitations, holding that the statute does not bar a challenge to a tax deed whose defect is founded on a want of title. *Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgartown, Inc.*, 401 Mass. 267, 269-270 (1987). A true statute of limitations would bar the action, irrespective of the nature of the defect. *See Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318, 330 (1900).

Whether construed as a substantive bar or as a procedural bar, Section 80C is wholly ineffective to cure the jurisdictional defect in the tax deed arising from the Town's constitutionally inadequate notice of the 1941 sale, and is itself unconstitutional as applied to this case, inasmuch as it immediately upon enactment extinguished vested claims based on defects in tax deeds recorded prior to July 21, 1966, without allowing for any time after its enactment for the assertion

of such claims. *Atchalfalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190, 196-197 (1922); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906); *Forster v. Forster*, 129 Mass. 559, 561-562 (1880), *cited with approval in Saranac Land & Timber Co. v. Roberts*, 177 U.S. 318, 330 (1900).

The Massachusetts low value foreclosure and sale procedure has manifest constitutional flaws, which can easily be corrected by augmenting the process with a requirement that notice of a Section 79 low value sale be given to readily ascertainable interested parties through the simple, cost-effective expedient of first-class mail. Massachusetts courts have long been aware of the problem[10], but

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[10]In decisions issued before and after *In Re Stacy*, 99 B.R. 142 (1989), Massachusetts appellate courts have repeatedly questioned, in light of *Mennonite*, the continued precedential value of *Guaranty Mortgage v. Town of Burlington*, 385 Mass. 411 (1982). *Christian v. Mooney*, 400 Mass. 753, 761 n. 10 (1987); *LaMontagne v. Knightly*, 30 Mass. App. Ct. 647, 654 (1991); *City*

have failed to take needed action to stem the tide of unconstitutional usurpations of vested property interests driven by this statutory relic, sidestepping the issue altogether or relying on plainly unconstitutional curative legislation. No amount of time can erase the damage wrought by the gross overreaching of a government enforcement apparatus acting without the kind of accountability due process is intended to ensure. Certiorari should be granted in the interest of settling this vexing question once and for all, and vindicating the constitutional rights of all citizens who have fallen victim to the archetypal exercises of unchecked state power authorized under Section 79 and similar legislation.

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of Boston v. James, 26 Mass. App. Ct. 625, 626-629 (1988).

CONCLUSION

For the foregoing reasons, certiorari should be granted on this petition.

Respectfully submitted,

Chesley T. Mears,
et als., Petitioners,

by their attorneys,

Dated: July 21, 1995

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APPENDIX

A

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, MA 02108
(617) 557-1020

Donald K. Freyleue, Esquire
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8 Washington Street
Beverly, MA 01915

RE: Docket No. FAR-07786

CHESLEY T. MEARS & others
vs.
FEDERAL DEPOSIT INSURANCE CORP.

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on April 24, 1995, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: April 24, 1995

To: Donald K. Freyleue, Esquire
Wilbur P. Edwards Jr., Esquire
Laurie A. Owen, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

94-P-788

CHESLEY T. MEARS & others[1]

vs.

FEDERAL DEPOSIT INSURANCE CORP., receiver[2]

MEMORANDUM AND ORDER UNDER RULE 1:28

On August 19, 1933, while seised of title to a twenty-eight acre parcel of land situated in the town of Hamilton ("locus"),[3] Charles W. Mears ("Charles") died (A. 25, 58). Upon his death, title to the locus passed, in equal shares, to his wife (Nellie M. Mears), his son (Delmar R. Mears, also named as an executor),

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[1]Elizabeth A. Thompson, Doris B. McAdams, John L. McAdams, and Carol M. Van Brundt.

[2]Of Olympic International Bank and Trust Co.

[3]Without rebuttal, the plaintiffs asserted in the Land Court that the locus "consisted of pasture land which made up the Essex homestead" of the Mears family on Western Avenue in the town of Essex, and that the dividing line between the Essex and Hamilton portions of the Mears homestead would not have been discernible to someone actually on the premises. Plaintiffs' Memorandum of Law in Opposition To Defendant's Cross-Motion for Summary Judgment, 7, and Exhibit E.

and his daughter (Ada MacAdams) by testamentary devise under the residuary clause of his will (A. 23). The plaintiffs' claim of title to the locus derives from this devise.[4]

In 1935, the town of Hamilton assessed a tax year 1935 real estate tax of $40.04 on the locus against "Charles W. Mears (heirs)". The tax was not paid. The town made demand upon "Charles W. Mears (heirs)" on April 10, 1936, and gave notice of its intention to take the locus by publication in the Salem Evening News on July 15, 1936, and by posting notices at the town hall and local post office (A. 12, 58).[5]

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[4]A petition for the probate of Charles' will was filed in the Probate Court on September 21, 1933 (A. 16, 25-26). The will was allowed on October 13, 1933 (A. 24).

[5]General Laws c. 60, § 53 (as amended through St. 1933, c. 164 § 3), provides: "If a tax on land is not paid within fourteen days after demand therefor and remains unpaid at the date of taking, the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking, which notice may be served in the manner required by law for the service of subpoenas on witnesses in civil cases or may be published, and shall conform to the requirements of section forty. He shall also, fourteen days before the taking, post a notice so conforming in two or more convenient and public places." General Laws, [by publication] shall contain . . . the

By instrument of taking dated July 30, 1936, and recorded in Book 3087, Page 24,[6] the town took the locus for nonpayment of taxes (A. 10-11, 58-59).

On or about October 7, 1941, the commissioner of corporations and taxation executed an affidavit (recorded in Book 3300, Page 452) certifying that the locus was of low value, insufficient to satisfy the tax, interest and charges due (A. 13, 59). On or about November 29, 1941, after having offered the locus for sale at public auction, the town acquired the locus by treasurer's deed, recorded at Book 3281, Page 11, on December 2, 1941 (A. 14-15, 59). The defendant receiver claims title

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means of all owners known to the collector. Such notice of the sale of the undivided real estate of a deceased person assessed to his heirs or devisees or assessed in general terms to his estate shall contain the names of all the heirs or devisees interested in such real estate, if the probate records of the county where the land lies disclose their identity."

[6]All recorded instruments to which we refer herein are recorded in the Essex South Registry of Deeds.

by mesne conveyances derived from the treasurer's deed.

By complaint filed in the Land Court on May 11, 1990, the plaintiffs commenced this action pursuant to G. L. c. 240, § 1, to determine title to the locus and to establish an appurtenant easement. The parties filed cross-motions for partial summary judgment. After hearing, the judge concluded that the town's demand was sufficient to give notice of the 1936 tax taking and that the town complied with the procedural requirements for the sale of low value land under G. L. c. 60, §§ 79 and 80, as then in effect, and thus that the taking was valid. The judge also ruled that the plaintiffs' claim, insofar as predicated on defective notice of the taking, was barred by operation of G. L. c. 60, § 80C.[7]

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[7]Section 80C (inserted by St. 1986, c. 283, § 1, and by § 2 of said chapter made applicable to instruments recorded prior to the effective date of the act) provides: "When any city or town has conveyed or sold any land under section seventy-nine or section eighty by an instrument in writing conveying or purporting to convey such land, and said instrument is duly recorded in the

The judge denied the plaintiffs' motion and allowed the defendant's motion. The plaintiffs have appealed.[8] We affirm.

1. Validity of tax taking. The plaintiffs, relying upon Pass v. Seekonk, 4 Mass. App. Ct. 447 (1976), first assert that the

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registry of deeds for the district wherein such land is situated and a period of twenty years elapses after the instrument is accepted for record, and the notice or procedure for the taking and sale or conveyance under this chapter or the instrument or record thereof because of a defect, irregularity, or omission, fails to comply in any respect with any requirement of law relating thereto or the instrument of record thereof shall, notwithstanding such defects, irregularities, or omissions be effective for all purposes or the instrument or record thereof had originally not been subject to any such defects, irregularities, or omissions, unless within such period of twenty years a proceeding is commenced on account of such defect, irregularity, or omission and notice thereof is duly recorded in said registry of deeds and indexed and noted on the margin of said instrument of conveyance and in the event of such proceeding, unless relief is thereby in due course granted."

[8]No separate final judgment was entered. As the judge's "order and judgment granting defendant's motion for summary judgment" effectively adjudicated the plaintiffs' easement claim, which was predicated upon the success of their underlying claim of title, see Roberts-Neustadter Furs, Inc. v. Simon, 17 Mass. App. Ct. 262, 264 (1983), we treat the judge's order as final for purposes of review. See Gottsegen v. Gottsegen, 397 Mass. 617, 618 n.1 (1986); Hodge v. King, 33 Mass. App. Ct 746, 750-751 (1992).

judge erroneously ruled that the demand upon "Charles W. Mears (heirs)" was sufficient.[9] We disagree.

We begin our analysis with G. L. c. 60, § 37, as amended through St. 1936, c. 146, which provides: "No tax title shall be held to be invalid by reason of any errors or irregularities in the proceedings of the collector which are neither substantial or misleading."[10] In the normal instance, whether an error or irregularity on the part of a collector is substantial or misleading within the meaning of § 37 is a question of fact which

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[9]"The collector shall, before selling the land of a resident, or non-resident . . . service on him a statement of the amount thereof with a demand for its payment. Of the heirs of a deceased person . . . or two or more persons are jointly assessed, service need be made on only one of them. . . . Demand shall be made by the collector by mailing the same to the last or usual place of business or abode, or to the address best known to him, and failure to receive the same shall not invalidate a tax or any proceedings for the enforcement or collection of the same." General Laws c. 60, § 16, as in effect prior to St. 1933, c. 168, § 1.

[10]The plaintiffs' reliance upon cases decided prior to the insertion of the predecessor to this statute is misplaced. Pass v. Seekonk, supra at 449-450.

must be decided according to the circumstances of each particular case. Pass v. Seekonk, supra at 450. On the record presented, we are of opinion that, as matter of law on the record before him, the judge could not properly have determined this point in favor of the plaintiffs.

The plaintiffs correctly assert that town officials are charged with notice of probate records, Hardy v. Jaeckle, 371 Mass. 573, 579 (1976); Hilde v. Dixon, 16 Mass. App. Ct 981, 981 (1983); Robertson v. Plymouth, 18 Mass. App. Ct 592, 594 (1984), which, the plaintiffs argued below, "would have provided the town with the name and address of the Executor, Delmar Mears, as well as Charles Mears' heirs at law, to whom notice could have been sent." Plaintiffs also asserted that "'it cannot be ruled as a matter of law that a demand addressed to [Delmar (sic) Mears] as Executor and Charles Mear's (sic) heirs at law] . . . would not have yielded the taxes in question.' [Pass v. Seekonk,] 4 Mass.

App. Ct. at 451." Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, 6-7.

The plaintiffs, however, have not produced any evidence to contradict the documentary evidence that the town made demand on April 10, 1936. They have not established that the town did not search the probate records, nor have they established that the demand was not served upon the heirs.[11] At best, on a minimal

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[11]The plaintiffs suggest that a check of the probate records would have revealed the address of Delmar Mears as executor. The records show that address to be "Western Ave., Essex, Mass." (A. 25). In view of the consistent and unrebutted assertions that, both prior to and after Charles' death, the Mears farm and homestead encompassing the locus was considered to be located on Western Avenue in Essex, see n.3 supra, there is nothing of record to show that the address in the probate records is inconsistent with the collector's own records. We think that the judge properly could infer that the probate records did not reveal a different address. There is no evidence that the collector made demand at an incorrect address, or other than to the "address best known to him" under c. 60, § 16. Contrast Bartevian v. Cullen, 369 Mass. 819, 821-823 (1976). We note also that "a seasonably recorded instrument of taking is prima facie evidence of facts essential to the validity of a municipality's title, such as the proper service of a demand for payment of taxes (G. L. c. 60, § 54) [.]" Id. at 822 n.3. Here, unlike in Bartevian, the undisputed facts show that demand was without a substantial or misleading error or irregularity.

record, the plaintiffs have established only that demand was made upon Charles' heirs instead of in the names of his devisees, but that irregularity, being merely overinclusive, is neither substantial nor misleading.[12] Compare Boston v. Lynch, 304 Mass. 272, 274-275 (1939). It follows from what we have said that the taking by the town was valid.

2. Validity of certification of low value. Where there has been a showing of the town's compliance with the statutory requisites for the taking and sale of low value land for nonpayment of taxes, "a challenge to the validity of the Commissioner's determination of value is not timely once the sale has been concluded and a deed recorded. Johnson v. McMahon, [344 Mass. 348,] 356 [(1962)]. In such circumstances the concern with preserving the integrity of the record title and protecting good faith

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[12]The record thus establishes that the collector directed demand to the proper parties, the devisees, and thus that the objective of the statute was met. Pass v. Seekonk, 4 Mass. app. Ct. at 449-452, upon which the plaintiffs rely, is thus distinguishable on its facts.

purchasers is apparent." Bigham v. Commissioner of Corps. & Taxn., 371 Mass. 270, 271-273 (1976).

3. Applicability of G. L. c. 60, § 80C. Notwithstanding the foregoing, the judge correctly ruled that the plaintiff's challenge to the notice or procedure for the taking and sale through which the defendant derives its title is barred by operation of G. L. c. 60, § 80C. See Lamontagne v. Knightly, 30 Mass. App. Ct. 647, 658-659 (1991). The cases relied upon by the plaintiffs are factually inapposite. This is not a situation where the title taken did not exist or did not encompass the locus. See Sheriff's Meadow Foundation, Inc. v. Bay-Courts Edgartown, Inc., 401 Mass. 267, 269-270

(1987); In re Stacy, 99 Bankr. 142, 151 (D. Mass. 1989).[13]

Order and judgment granting defendant's motion for summary judgment affirmed.

By the Court (Warner, C.J., Perretta & Smith, JJ.),

Clerk

Entered: March 3, 1995.

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[13]Where title is lacking, § 80C is inapplicable. "[T]he statute cannot cure a defect which is founded on a want of title. . . [and] cannot supply title which did not exist at the time of the taking." Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgartown, Inc., supra at 270. See Opinion of the Justices, 408 Mass. 1215, 1222 (1990). Here, title was not lacking. Defective notice is precisely the type of "defect", irregularity, or omission" contemplated in the statute. Lamontagne v. Knightly, supra. Other cases decided prior to the enactment of § 80C and on which the plaintiffs rely are inapposite.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Essex, ss. Miscellaneous
Case No. 144382

CHESLEY T. MEARS, ELIZABETH A. THOMPSON, DORIS B. McADAMS, JOHN L. McADAMS and CAROL M. VAN BRUNDT,
Plaintiffs

vs.

FEDERAL DEPOSIT INSURANCE CORP., AS LIQUIDATING AGENT/RECEIVER OF OLYMPIC INTERNATIONAL BANK AND TRUST COMPANY,
Defendant

ORDER AND JUDGMENT GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

By complaint filed on April 11, 1990, Plaintiffs, pursuant to G. L. c. 240, §1, seek to determine the title to land located in Hamilton ("Locus").

On or about March 9, 1994, Defendant Federal Deposit Insurance Corp. ("FDIC"), as liquidating Agent/Receiver of Olympic International Bank and Trust Company, of which original Defendant Fort Hill Corp. was a

subsidiary, was substituted as the defendant in this action.

This cause came on to be heard on March 10, 1994 upon Plaintiffs' and the FDIC's cross-motions for Summary Judgment pursuant to Rule 56, Mass. R. Civ. P. After hearing arguments of counsel and reviewing the pleadings, memoranda, affidavits and other pertinent documents, I find there to be no issue of material fact in dispute and that accordingly, this case is ripe for summary judgment. Community National Bank v. Dawes, 369 Mass. 550 (1976).

I find the following facts to be pertinent and undisputed:

1. Locus contains approximately 28 acres of land as described in a deed dated June 22, 1921 from Bertram W. Mears to Charles W. Mears ("Mears"), recorded at the Essex South District Registry of Deeds[1] in Book 2790, Page 403.

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[1]All recorded instruments referred to subsequently herein are located in this Registry.

2. Plaintiffs claim title to Locus by testamentary devise under the last will and testament of Mears, who died on August 19, 1993. (See, Essex Probate Docket #177166).

3. The original defendant, Fort Hill Corporation, and presently the FDIC, claim title to Locus by mesne conveyances from a Tax Collector's Deed, dated November 29, 1941, recorded in Book 3281, Page 11.

4. In 1935, the Town of Hamilton (the "Town") assessed a real estate tax on Locus of $40.04 for the tax year 1935 against "Charles W. Mears (heirs)." Said real estate tax was not paid.

5. Having made demand upon "Charles W. Mears (heirs)" by publication in the Salem Evening news on July 15, 1936 and by posting notices at the Hamilton Town Hall and the Hamilton Post Office Building, the Town took Locus by an Instrument of Taking, dated July 30, 1936, recorded in Book 3087, Page 24.

6. On or about October 7, 1941, the Commissioner of Corporations and Taxation executed an affidavit certifying that Locus was of low value, insufficient to satisfy the tax, interest and charges due. Said affidavit was recorded in Book 3300, Page 452.

7. On or about November 29, 1941, after having duly offered Locus for sale at a public auction pursuant to G.L. c. 60, §§79 and 80, the Town acquired title to Locus.

Having reviewed the relevant and applicable statutes, I find that the Town's 1936 tax taking of Locus was in accordance with the procedures set forth in said statutes. Plaintiffs' contention that inadequate notice was given is without merit. I find that the demand made upon "Charles W. Mears (heirs)" by the Town was sufficient to give notice to Plaintiffs, the devisees under the last will and testament of Mears, of the tax taking of Locus. I do not find that there is a distinction between the heirs of Mears and the devisees under the last

will and treatment of Mears, especially where they are essentially the same people. Moreover, pursuant to G.L. c. 60, §§79 and 80, as said statutes were in effect in 1936, the Town was not required to give actual notice to land owners, rather said statutes only required that notice be given by publication and by posting in some convenient and public place in town. Thus, based upon the foregoing, I find that the Town complied with the 1936 procedural requirements of G.L. c. 60 §§ 79 and 80 for the taking of Locus and therefore, the 1936 tax taking of Locus is valid.

As the 1936 tax taking of Locus is valid, G.L. c. 60 §§80C is applicable to the present case. Said statute requires that any challenge to a tax taking on the grounds that notice was defective must be made within 20 years from the time the Tax collector's deed is recorded. Having failed to challenge the 1936 tax taking of Locus for more than 48 years, I find that

Plaintiffs are now barred from doing so presently.

Accordingly, based upon the foregoing, I hereby grant summary judgment in favor of the FDIC and deny Plaintiffs' motion for summary judgment; and it is

ADJUDGED AND ORDERED that the 1936 tax taking of Locus by the Town pursuant to G.L. c. 60, §§79 and 80 is valid; and it is

FURTHER ADJUDGED AND ORDERED that the FDIC is the present legal title owner of Locus; and it is

FURTHER ADJUDGED AND ORDERED that Plaintiffs are barred from challenging the 1936 tax taking of Locus and therefore, this action is hereby dismissed.

By the Court. (Cauchon, C.J.)

Attest:

Charles W. Trombly, Jr.
Recorder

Dated: March 23, 1994

COMMONWEALTH OF MASSACHUSETTS

Essex, ss. Land Court Department
Case No. 144-382

CHESLEY T. MEARS, ELIZABETH A. THOMPSON, DORIS B. McADAMS, JOHN L. McADAMS and CAROL M. VAN BRUNDT,
Plaintiffs

v.

FORT HILL CORPORATION,
Defendant

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

The Plaintiffs brought this action on or about April 10, 1990, pursuant to Order of the Land Court to Try Title, dated February 12, 1990, Miscellaneous Case No. 127403. The Plaintiffs claim title to a certain parcel of land located in Hamilton, Massachusetts, containing 28 acres, more or less (the "Property"), as described in a deed dated June

22, 1921, from Bertram W. Mears to Charles W. Mears, and recorded with the Essex South District Registry of Deeds, Book 2790, Page 403. The Plaintiffs are the heirs at law of Charles W. Mears, who died on August 19, 1933, and claim title to the Property by inheritance through the Estate of Charles W. Mears, Essex Probate Docket Number 177166.

The Land Court ordered this action to ascertain the validity of the Plaintiffs' title as against the adverse claim of the Defendant, Fort Hill Corporation ("Fort Hill"), which claims title deriving from a Tax Collector's Deed, dated November 29, 1941, from the Treasurer of the Town of Hamilton to the Town of Hamilton, and recorded with the Essex South District Registry, Book 3281, Page 11.

The Plaintiffs seek partial summary judgment on the question of title to the property on the grounds that the uncontroverted facts establish that, as a matter of law, the

Town of Hamilton failed to exercise reasonable diligence in identifying interested parties, and to give constitutionally adequate notice of the low value tax taking which gave rise to the 1941 Tax Collector's Deed, in comportment with due process of law, and that therefore the tax title was void ab initio, rendering Fort Hill's title defective.

II. ARGUMENT

A. [omitted]

1. [omitted]

2. The defect in Fort Hill's title cannot be cured under M.G.L. c. 60, §80C.

Under General Laws c. 60, §80C, no error or irregularity shall defeat a tax title unless an interested party brings an action challenging the title within 20 years of the recordiing of the tax title. This 20 year curing statute does not, however, cure a tax title which was void ab initio due to an error or irregularity going to the validity of the title itself, as opposed to

a mere procedural defect or omission. *Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgartown, Inc.*, 401 Mass. 267, 270 (1987); *see Opinion of the Justices*, 408 Mass. 1215, 1222 (1990). Section 80C "cannot supply title which did not exist at the time of the taking." *Sheriff's Meadow Foundation, Inc. v. Bay-Courte Edgarown, Inc.*, 401 Mass. at 270.

The failure of taxing authorities to observe the minimum constitutional requirements in carrying out a tax taking proceeding creates a defect founded on want of title, which cannot be cured under Section 80C. *In Re Stacy*, 99 B.R. 142, 151 (D. Mass. 1989). "'[A] curative statute cannot cure retroactively a failure to observe constitutional requirements . . . Nor may a curative act operate so as to deprive a property owner of his property without due process of law.'" *Id.*, 99 B.R. at 152, *quoting from* 23 Am.Jur.2d *Deeds*, §191. The Town of Hamilton's tax title was, therefore, viod from

its inception, founded on constitutionally deficient notice, and, consequently, is not subject to the curing provisions of G.L. c. 60, §80C.

3. [omitted]

III. CONCLUSION

For the above reasons, the Plaintiffs respectfully request this court to enter partial summary judgment in their favor on the grounds that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law.

Chesley T. Mears, et als.,
by their attorney,

Dated: _____

_____
Donald K. Freyleue
GLOVSKY & GLOVSKY
Eight Washington Street
Beverly, MA 01915
(508) 922-5000
BBO# 549822

To the Honorable the Judge of the Probate Court in and for the County of Essex:

Respectfully represents Delmar R. Mears of Essex in the County of Essex that Charles W. Mears who last dwelt in Essex in said County of Essex, died on the nineteenth day of August in the year of our Lord one thousand nine hundred and thirty-three possessed of good and estate remaining to be administered, leaving as widow, his only heirs-at-law and next of kin, the persons whose names, residences and relationship to the deceased are as follows, viz:

Name	Residence	Relationship
Nellie M. Mears	Essex, Mass.	Wife
Ada MacAdams	Chelsea, Mass.	Daughter
Bertram W. Mears	Essex, Mass.	Son
Delmar R. Mears	Essex, Mass.	Son

That said deceased left a WILL herewith presented, wherein your petitioner is named ~~executor~~, James J. Ronan the other executor declining to serve and wherein the testator has requested that your petitioner be exempt from giving a surety on his bond.

Wherefore, your petitioner prays that said will may be proved and allowed and letters testamentary issued to him, without giving a surety on his official bond, an certifies that the statements herein contained are true to the best of his knowledge and belief.

Dated this eighteenth day of September A.D. 1933.

Mailing Address.

Western Ave., Delmar R. Mears

Essex, Mass.

Essex, ss. Subscribed and sworn to this eighteenth day of September A.D. 1933

Before me, Benjamin F. Raymond, Justice of the Peace.

The undersigned, being all the persons intereted in the estate who are of full age and legal capacity, other than creditors, and the guardians of persons interested therein, hereby consent that the above-named petitioner be except from giving any surety on his bond, and that the above petition be granted _____.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 16 (1936)

Demand; statement of amount

The collector shall, before selling the land of a resident, or non-resident, or distraining the goods of any person, or arresting him for his tax, serve on him a statement of the amount thereof with a demand for its payment. If two or more parcels of land are assessed in the name of a resident, or non-resident, the statement of the aggregate amount of the taxes thereon may be made in one demand. Such demand may also include taxes due on account of tangible personal property and any motor vehicle excise tax. If the heirs of a deceased person, co-partners or two or more persons are jointly assessed, service need be made on only one of them. Such demand for the tax upon land may be made upon the person occupying the same on January first of the year in which the tax is assessed. No demand need be made on a mortgagee, unless he has given notice under section thirty-eight, in which case no demand need be made on the owner or occupant. Demand shall be made by the collector by mailing the same to the last or usual place of business or abode, or to the address best known to him, and failure to receive the same shall not invalidate a tax or any proceedings for the enforcement or collection of the same.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 53 (1936)

Taking for taxes; notice

If a tax on land is not paid within fourteen days after demand therefor and remains unpaid at the date of taking, the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking, which notice may be served in the manner required by law for the service of subpoenas on witnesses in civil cases or may be published, and shall conform to the requirements of section forty. He shall also, fourteen days before the taking, post a notice so conforming in two or more convenient and public places.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 62 (1936)

Land taken or sold for taxes; redemption

Any person having an interest in land taken or sold for nonpayment of taxes, including those assessed under sections twelve, thirteen and fourteen of chapter fifty-nine, or his heirs or assigns, at any time prior to the filing of a petition for foreclosure under section sixty-five, if the land has been taken or purchased by the town and has not been assigned, may redeem the same by paying or tendering to the treasurer the amount of the tax title account of the land being redeemed, and interest at six and one-half percent upon the original sum for which the land was taken or sold, from the date of sale, and upon each sum certified in accordance with section sixty-one, from the date of certification, together with all charges lawfully added to the tax title account of such land subsequently to such taking or sale, or may redeem the same by paying or tendering to said treasurer installments on account of the tax title account, each of which except the last, shall be in amount of not less than twenty-five per cent of the sum for which the land was originally sold, together with the full amount of interest, as aforesaid, to the date of payment of the amount of the tax title account or balance thereof remaining due at the time of such payment, and all charges lawfully added as aforesaid until the full amount of the tax title account, with interest as aforesaid and all such charges, is paid. Each such installment shall be received, receipted for, and applied toward the redemption of the land so taken or purchased. The treasurer upon accepting any payment hereunder may extend the time during which proceedings for the foreclosure of all rights of redemption may not be instituted, for a period not exceeding one year beyond the time

provided by section sixty-five; but not more than one such extension shall be granted. An extension granted hereunder shall be entered upon the tax title account, and a written statement thereof shall be given to the person who made the payment.

(second, third and fourth paragraphs omitted)

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 65 (1941)

Rights of redemption; petition for foreclosure; legal fees

After two years from a sale or taking of land for taxes, except as provided in section sixty-two, whoever then holds the title there acquired may bring a petition in the land court for the foreclosure of all rights of redemption thereunder. Such petition shall be made in the form to be prescribed by said court and shall set forth a description of the land to which it applies, with its assessed valuation, the petitioner's source of title, giving a reference to the place, book and page of record, and such other facts as may be necessary for the information of the court. Two or more parcels of land may be included in any petition brought by a town, whether under a taking or as purchaser of such title or titles, if such parcels are in the same record ownership at the time of bringing such petition. The land court in each petition filed by a city or town may, upon motion, order the payment of legal fees to a city or town, which amount shall be added to the tax title account of the land to which the right of redemption is being foreclosed; provided, however, that if the value of the parcel of land involved is twenty-five hundred dollars or less, such legal fees shall not exceed fifty dollars, and if the value of such parcel is in excess of twenty-five hundred dollars, such legal fees shall not exceed two hundred dollars.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 66 (1941)

Title examinations; notice

Upon the filing of such a petition the court shall forthwith cause to be made by one of its official examiners an examination of the title sufficient only to determine the persons who may be interested in the same, and shall upon the filing of the examiner's report notify all persons appearing to be interested, whether as equity owners, mortgagees, lienors, attaching creditors or otherwise, of the pendency of the petition, the notice to be sent to each by registered mail and return receipt required, the addresses of respondents, so far as may be ascertained, being furnished by the petitioner. Such other and further notice by publication or otherwise shall be given as the court may at any time order. The notice, to be addressed "To all whom it may concern", shall contain the name of petitioner, the names of all known respondents, a description of the land and a statement of the nature of the petition, shall fix the time within which appearance may be entered and answer filed, and shall contain a statement that unless the party notified shall appear and answer within the time fixed a default will be recorded, the petition taken as confessed, and the right of redemption forever barred.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 68 (1941)

Answer; offer of redemption; hearing

Any person claiming an interest, on or before the return day or within such further time as may on motion be allowed by the court, shall, if he desires to redeem, file an answer setting forth his right in the land, and an offer to redeem upon such terms as may be fixed by the court. Thereupon the court shall hear the parties, and may in any case in its discretion make a finding allowing the party to redeem, within a time fixed by the court, upon payment to the petitioner of an amount sufficient to cover the original sum, costs, interest at the time rate of six and one-half percent per annum and all subsequent taxes, cost and interest to which the petitioner may be entitled under sections sixty-one and sixty-two, together with the costs of the proceeding and such counsel fee as the court deems reasonable. The court may impose such other terms as justice and the circumstances warrant.

(second paragraph omitted)

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 69 (1941)

Decree barring redemption;
vacating decree; petition

If a default is entered under section sixty-seven, or if redemption is not made within the time and upon the terms fixed by the court under the preceding section, or if at the time fixed for the hearing the person claiming the right to redeem does not appear to urge his claims, or if upon hearing the court determines that the facts shown do not entitle him to redeem, a decree shall be entered which shall forever bar all rights of redemption.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 79 (1941)

Sales without foreclosure; inquiries

After ninety days from the taking or purchase by a town of any parcels of land for non-payment of taxes, the commissioner may, and on written application of the town treasurer shall, inquire into the value of such parcels and validity of tax titles held thereon. As a part of such inquiry the commissioner shall, upon written request therefor by any person in interest, hear such person relative to any matter pertaining to such inquiry. If the commissioner is of the opinion that such parcels are of insufficient value to meet the taxes, interest and charges including the payment of fifty dollars to a city or town as the legal fee for proceedings under this section, and all subsequent taxes and assessments thereon, together with the expenses of a foreclosure under section sixty-nine, including the payment of fifty dollars to a city or town as the legal fee for proceedings under this section, that none of such parcels exceeds one thousand dollars in value, and that the facts essential to the validity of the tax titles on such lands have been adequately established, he shall make affidavit of such finding, which shall be recorded in the registry of deeds for the district wherein the land lies.

The commissioner may require the treasurer to include in his application a statement under the penalties of perjury setting forth such information appearing in the records of the assessors and of the collector and tending to establish the validity of the tax titles on such parcels of land as the commissioner deems meet. The statement so made, or such portion thereof as the commissioner finds pertinent, may be incorporated in his affidavit and, when

recorded, shall be prima facie evidence of such facts.

Upon the recording of the affidavit the treasurer may sell all the parcels included therein, severally or together, at public auction to the highest bidder, first giving notice of the time and place of sale by posting a notice of the sale in some convenient and public place in the town fourteen days at least before the sale; provided, that the treasurer at such auction may reject any bid which he deems inadequate. If the sale under this section shall not be made within four years from said taking or purchase,it shall be made by the treasurer for the time being when he deems best, or at once upon service on him of a written demand by any person interested therein. The treasurer shall execute and deliver to the highest bidder whose bid has not been rejected as inadequate a deed without covenant except that the sale has in all particulars been conducted according to law. Such deeds shall not be valid unless recorded within sixty days after the sale. Title taken pursuant to a sale under this section shall be absolute upon the recording of the deed of the treasurer in the proper registry of deeds within such sixty days.

If the amount received from the sale is more than the taxes, interest and charges, and subsequent taxes and assessments, on all lands included in the sale, together with the expenses thereof, the balance shall be deposited with the town treasurer to be paid to the person entitled thereto if demanded within five years, otherwise it shall enure to the town. If such surplus results from the sale of several parcels for a lump sum, it shall be held as aforesaid for the several owners in proportion to the prices at which the several parcels were originally taken or purchased by the town.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 80 (1941)

Lack of inadequate bids;
sales without foreclosure

If no person bids at such a sale or if no bid deemed adequate by the treasurer is made thereat and if the sale has been adjourned one or more times, the treasurer shall then and there make public declaration of the fact, and if no bid or no bid deemed adequate as aforesaid is then made he shall give public notice that he purchases for the town by which the tax is assessed; or if the person to whom the land is sold does not within ten days pay to the treasurer the sum bid by him the sale shall be void and the town shall be deemed to be the purchaser of the land. If the town becomes the purchaser hereunder, the treasurer shall execute to it a deed which shall set forth the fact that no bid or no bid deemed adequate as aforesaid was made at the sale or that the purchaser failed to pay the amount bid, as the case may be. Such deed shall not be valid unless recorded within sixty days after the sale under this section; and the title of the town to land conveyed thereby shall be absolute upon the recording of said deed in the proper registry of deeds within such sixty days.

MASSACHUSETTS GENERAL LAWS
CHAPTER 60, SECTION 80C (1986)

Title to land conveyed under
79 or 80; curing defects

When any city or town has conveyed or sold any land under section seventy-nine and section eighty by an instrument in writing conveying or purporting to convey such land, and said instrument is duly recorded in the registry of deeds for the district wherein such land is situated and a period of twenty years elapses after the instrument is accepted for record, and the notice or procedure for the taking and sale or conveyance under this chapter or the instrument or record thereof because of a defect, irregularity, or omission, fails to comply in any respect with any requirement of law relating thereto or the instrument or record thereof shall, notwithstanding such defects, irregularities, or omissions be effective for all purposes to the same extent as though such notice or procedure or the instrument or record thereof had originally not been subject to any such defects, irregularities, or omissions, unless within said period of twenty years a proceeding is commenced on account of such defect, irregularity, or omission and notice thereof is duly record in said registry of deeds and indexed and noted on the margin of said instrument of conveyance and in the event of such proceeding, unless relief is thereby in due course granted.

(2)

Supreme Court, U.S.
FILED
SEP 27 1995
CLERK

No. 95-133

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHESLEY T. MEARS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS LIQUIDATING AGENT/RECEIVER OF OLYMPIC INTERNATIONAL BANK AND TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether title to property currently held by the FDIC as receiver of a failed bank is subject to claims by petitioners, where petitioners took no action to enforce their alleged rights for a period of more than 48 years.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-133

CHESLEY T. MEARS, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS LIQUIDATING AGENT/RECEIVER OF OLYMPIC INTERNATIONAL BANK AND TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The notice denying further appellate review by the Supreme Judicial Court of Massachusetts (Pet. App. A1) is unpublished, but the decision is noted at 648 N.E.2d 1285 (Table). The opinion of the Massachusetts Appeals Court (Pet. App. A2-A12) is also unpublished, but the decision is noted at 646 N.E.2d 1097 (Table). The order and judgment of the Massachusetts Land Court (Pet. App. A13-A18) is unreported.

JURISDICTION

The judgment of the Massachusetts Appeals Court was entered on March 3, 1995. The Supreme Judicial

Court of Massachusetts denied further appellate review of the Appeals Court decision on April 24, 1995. The petition for a writ of certiorari was filed on July 24, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. Charles W. Mears died in 1933. He was the owner of a 28-acre parcel of land (the property) situated in the town of Hamilton, Massachusetts. Pet. App. A2. Upon his death, title to the property passed to his wife, his son, and his daughter (the devisees) in equal shares by testamentary devise under the residuary clause of his will. *Id.* at A3-A4. The will of Charles W. Mears was approved for probate on October 13, 1933. Pet. 4. The petitioners, the heirs at law of the devisees, *ibid.*, trace their asserted title to the property to this 1933 testamentary devise.

2. Respondent, the Federal Deposit Insurance Corporation (FDIC), as Liquidating Agent/Receiver of Olympic International Bank and Trust Company (Bank), succeeded to the interest of the Bank as mortgagee of the property after the Bank failed in June, 1992. In 1988, the Bank had made a loan which was secured by a mortgage on the property. When the mortgagor defaulted on the loan, the Bank accepted a deed to the property in lieu of foreclosure of the mortgage. The Bank subsequently deeded the property to its wholly owned subsidiary, the Fort Hill Corporation, which was dissolved by the FDIC in 1993 after the Bank closed. At that point, title to the property reverted to the FDIC as receiver of the Bank.

The mortgagor's title to the property was derived from a series of conveyances beginning with a Treas-

urer's Deed to the Town of Hamilton, dated November 29, 1941. The FDIC's title to the property ultimately derives from that Treasurer's Deed.

3. In 1935, after the death of Charles W. Mears, the Town of Hamilton assessed a real estate tax of $40.04, for tax year 1935, against the immediate heirs of Charles W. Mears (the devisees). Pet. App. A3. The tax was not paid. The town made demand for payment of taxes due upon "Charles W. Mears (heirs)" in April, 1936. *Ibid.* When no payment was made, the town gave notice of its intention to take the property by publication in the Salem Evening News on July 15, 1936, and by posting notices at the town hall and local post office, all in conformity with the statutes then applicable. *Ibid.*[1] When no response was received, the Town took the property for nonpayment of taxes and recorded an instrument of taking in the Essex County Registry of Deeds, dated July 30, 1936. *Id.* at A4.

4. On or about October 7, 1941, the commissioner of corporations and taxation for the Commonwealth of Massachusetts executed an affidavit, duly recorded, certifying that the property was of low value and insufficient to satisfy the tax, interest and charges due. Pet. App. 4A.[2] On or about November 29, 1941, after having offered the property at public auction,[3] the Town acquired the property by Treasurer's

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[1] See Mass. Gen. L. ch. 60, § 53 (1936) (Pet. App. A27).

[2] See Mass. Gen. L. ch. 60, § 79 (1941) (Pet. App. A34-A35).

[3] Section 79 required public notice of the auction "by posting a notice of the sale in some convenient and public place in the town fourteen days at least before the sale." Pet. App. A35.

Deed,[4] and on December 2, 1941, the deed was recorded in the Essex County Registry of Deeds. *Ibid.*

5. On April 10, 1990, petitioners commenced this action in the Massachusetts Land Court against the Fort Hill Corporation (the Bank's subsidiary), the owner of the property at the time, to determine title to the property and to establish an appurtenant easement. Pet. App. A5, A19-A20. The action was brought pursuant to an Order of the Land Court to Try Title, dated February 12, 1990 (see Mass. Gen. L. ch. 240, § 1 (1986)). Pet. App. A19-A20. The parties filed cross-motions for summary judgment. Petitioners asserted in their motion for summary judgment that the town of Hamilton had failed both "to exercise reasonable diligence in identifying interested parties" and "to give constitutionally adequate notice of the low value tax taking which gave rise to the 1941 [Treasurer's] Deed, in comportment with due process of law." *Id.* at A21. Thus, petitioners argued that the tax title was void *ab initio*, rendering defective all subsequent conveyances deriving from the Treasurer's Deed of 1941. *Ibid.*

6. After a hearing, the Land Court rejected petitioners' arguments, concluding that the town's demand for payment of taxes was sufficient to give notice of the ensuing tax taking and that the town had complied with all procedural requirements then in effect for the sale of low value land under Sections 79 and 80 of chapter 60 of the General Laws of Massachusetts (1941). The Land Court also ruled that petitioners' claim, insofar as it was predicated on an alleged deficiency in notice prior to the taking, was barred by operation of Section 80C of chapter 60 of the General

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[4] See Mass. Gen. L. ch. 60, § 80 (1941) (Pet. App. A36).

Laws of Massachusetts (1986). Section 80C, enacted in 1986, provides that a duly recorded conveyance of land by a city or town pursuant to Section 79 or 80 shall not be "subject to any * * * defects, irregularities, or omissions" with respect to the "notice or procedure for the taking and sale or conveyance," if a period of 20 years has elapsed since the conveyance or sale was recorded and no proceeding has been commenced "on account of such defect, irregularity, or omission" during that time. Pet. App. A37.[5] The Land Court therefore declared that the FDIC is the present legal title owner of the property and granted summary judgment for respondent. *Id.* at A18.

7. The Massachusetts Appeals Court affirmed. Pet. App. A2-A12. The Appeals Court made three findings. First, it found that the record clearly established the fact that the tax collector in the Town of Hamilton had served a legally sufficient demand for payment of taxes due on the heirs of Charles W. Mears in 1936, before the property was taken for nonpayment. *Id.* at A6-A10.[6] Based on that fact, the

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[5] Nothing in the record shows an intervening challenge to the Treasurer's Deed to the Town of Hamilton from December, 1941, until the filing of the Land Court action in April, 1990.

[6] Section 16 of chapter 60 of the General Laws of Massachusetts (1936), as written at the time, provided in pertinent part (Pet. App. A26):

> The collector shall, before selling the land of a resident, or non-resident, * * * serve on him a statement of the amount thereof with a demand for its payment. * * * If the heirs of a deceased person * * * are jointly assessed, service need be made on only one of them. * * * Demand shall be made by the collector by mailing the same to the last

court ruled that the subsequent taking of the property was not invalid for lack of notice. *Id.* at A10. Second, the court rejected as untimely a challenge to the validity of the commissioner's low value determination pursuant to Section 79. *Id.* at A10-A11. Third, the court affirmed the Land Court's ruling that petitioners' challenge to the notice procedures for the taking and sale is barred by Section 80C. *Id.* at A11.

8. On April 24, 1995, the Supreme Judicial Court of Massachusetts declined to grant further appellate review. Pet. App. A1.

ARGUMENT

1. Petitioners' factual and legal arguments regarding lack of notice are without merit.

a. Petitioners rely on this Court's decision in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), to argue that the Town's failure to give "actual notice" of the taking of the property in 1936 or of the tax sale of the property in 1941 violated due process and voids both the taking and the sale. Pet. 12-17 & n.9. In *Mennonite*, the Court held that, to satisfy the Due Process Clause, a county must take reasonable steps to provide a mortgagee with actual notice of a proceeding to sell mortgaged property for nonpayment of taxes, so long as the mortgagee's name and address are reasonably ascertainable. 462 U.S. at 798-800. The county officials in that case failed to meet the minimum procedural due process requirements, since the officials, in compliance with the State of Indiana's tax foreclosure laws, merely posted notice

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or usual place of business or abode, or to the address best known to him.

of the tax sale at the county courthouse and published a newspaper notice of the same. *Id.* at 792-794. No notice had been mailed to or served on the petitioner, the mortgagee, despite the fact that the mortgagee was easily identified through the publicly recorded mortgage. *Id.* at 798.

The mortgagee in *Mennonite* not only had no knowledge of the tax sale proceedings, it did not even know that the mortgagor had been delinquent and had failed to pay real estate taxes on the property. 462 U.S. at 792. In the instant case, on the other hand, the state trial and appellate courts each concluded, as a factual matter, that a demand for nonpayment of taxes had been personally served, at least by mail, on one or more of the devisees in April, 1936. Pet. App. A7-A8, A15-A16. The state trial and appellate courts then ruled that actual notice of the demand for nonpayment placed the devisees on constitutionally sufficient notice that a taking would ensue if their delinquency continued, *id.* at A10, A16, a conclusion that is fully consistent with this Court's holding in *Mennonite*.

The *Mennonite* Court stated in dictum that "a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." 462 U.S. at 800. However, knowledge of that type would have significance to the *owner* of property different from its significance to the mortgagee. The owner has a more direct interest in the property than the mortgagee, cf. *id.* at 799 (noting that publication and posting are especially ineffective for reaching mortgagees "who, although they have an interest in the property, do not make special efforts to keep abreast of such notices"), and only the owner would have direct knowledge of whether the de-

linquency continued unabated. Unless a mortgagee learns otherwise, a mortgagee might naturally assume that the property owner would satisfy the tax debt in a timely fashion. An owner, however, can reasonably be charged with notice of the legal consequences that are likely to follow once the owner has actual notice of a delinquency.

b. Petitioners urge an expansive reading of *Mennonite*, under which a demand for nonpayment of taxes personally served on the owner of property is insufficient notice that a tax taking might ensue. This case, however, does not appropriately raise that issue because it involves a contested factual record concerning events occurring more than 60 years ago. *Mennonite* involved a mortgagee that acted promptly to vindicate its rights. The tax taking in *Mennonite* occurred in 1977; the two-year redemption period for the mortgaged property ended on August 8, 1979. See 462 U.S. at 794. The mortgagee learned of the tax foreclosure eight days later on August 16, 1979. *Ibid.* When an action to quiet title was brought against the mortgagee in November, 1979, the mortgagee was available to attest to the fact that it had no knowledge of the tax sale prior to August 16, 1979, which was the basis for its due process challenge.

In the instant case, however, petitioners waited nearly 50 years to commence their challenge to the 1941 tax sale. The devisees, the owners of the property during the relevant time period (1936-1941), are no longer alive[7] and thus cannot testify as to their knowledge at that time. Nothing in the record in this case, other than the fact that the $40.04 real estate

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[7] Petitioners describe themselves as the "heirs at law" of the devisees. See Pet. 4.

tax was never paid, indicates whether any of the devisees became aware of the publicly posted and published notices of the 1936 tax taking or the 1941 tax sale. If one of the devisees did have such knowledge but failed to act on it, there would be no procedural due process violation, even if the devisees were not personally served with notice.

c. Petitioners argue that certiorari should be granted "to resolve a direct conflict between federal and state jurisprudence concerning the constitutionality of the statutory notice provisions pertaining to [low value] tax sales conducted under [Mass. Gen. L. ch. 60, § 79 (1941)]." Pet. 10. Petitioners cite *Guaranty Mortgage Corp.* v. *Town of Burlington*, 432 N.E.2d 480 (Mass. 1982), a case decided prior to this Court's decision in *Mennonite*, as the source of the conflict. *Guaranty Mortgage* rejected a procedural due process challenge to Section 79, which allows notice by publication for tax sales of low value property. *Id.* at 485-486.

Guaranty Mortgage does not pose a "direct conflict" with *Mennonite*. To the extent that *Guaranty Mortgage* held that notice by publication of a tax sale is sufficient to protect the interests of mortgagees, that aspect of the case appears to have been overruled by *Mennonite*. To the extent that *Guaranty Mortgage* held that publication by notice is sufficient for owners of property who have already received personal notice by mail of their tax delinquency, that holding poses no necessary conflict with *Mennonite*.

There is also no conflict for this Court to resolve because the Massachusetts Supreme Judicial Court has acknowledged in dictum that *Mennonite* may require reconsideration of certain aspects of *Guaranty Mortgage*, should the appropriate case arise.

See *Christian* v. *Mooney*, 511 N.E.2d 587, 592 n.10 (Mass. 1987) (noting that *Mennonite* casts "some doubt at least on the reasoning in *Guaranty Mortgage*"), cert. denied, 484 U.S. 1053 (1988); see also *Lamontagne* v. *Knightly*, 572 N.E.2d 1375, 1379-1380 (Mass. App. Ct. 1991) (discussing the extent to which *Christian* indicated that *Guaranty Mortgage* has been overruled by *Mennonite*). Unless the Massachusetts courts, having had a full opportunity to revisit the notice procedures in Section 79 tax sales, issue a post-*Mennonite* decision in conflict with that case, any intervention by this Court to resolve an alleged conflict would be premature.

2. Section 80C of chapter 60 of the Massachusetts General Laws, enacted in 1986, provides a 20-year period from the time a tax title is recorded for making a challenge to a taking or conveyance of property utilizing "low value" procedures (Mass. Gen. L. ch. 60, § 79 (1941)) based on deficiencies in notice. Petitioners waited more than 48 years after the tax title was recorded in 1941, and nearly four years after the enactment of Section 80C in 1986, to bring their claim. The state trial and appellate courts correctly ruled that petitioners' claim was time-barred. Pet. App. A11-A12, A17-A18.

Petitioners assert (Pet. 17-20) that constitutional defects in procedures, "including defects based on want of legally mandated notice" (Pet. 18), cannot be rectified by a purely retroactive, curative statute, unless the statute provides for a "reasonable time" after its enactment "within which any party affected could assert his rights." *Saranac Land & Timber Co.* v. *Comptroller of New York*, 177 U.S. 318, 330 (1900). Cf. *id.* at 324 (holding that six months is a reasonable period for interested parties to assert

their rights following the enactment of a statute quieting title to certain deeds that were sold for nonpayment of taxes); *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982) (upholding a state statute that automatically extinguished mineral interests that had not been used for 20 years, without any notice to owners, because the statute included a two-year grace period, which "afford[ed] the citizenry a reasonable opportunity to familiarize itself with its terms and comply").

Section 80C does not expressly provide for a grace period during which interested parties could bring claims against tax titles that were recorded more than 20 years prior to July 21, 1986, the effective date of the statute. If a claim contesting a tax title had been brought within a reasonable time after July, 1986, a state court might have construed the statute to allow such a grace period in order to save the statute from constitutional attack. Petitioners, however, raised their procedural due process claim for the first time in June, 1993, nearly seven years after the enactment of Section 80C. See Pet. 7. Because of the tardiness of their claim, petitioners are in no position to complain about the absence of a reasonable grace period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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